160

No. 09-1311

Supreme Court, U.S.
FILED
FEB 18 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARVEL THOMPSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MARVEL THOMPSON, *pro se*
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QUESTIONS PRESENTED

1. Is petitioner's guilty plea and 540 month sentence unconstitutional because: (a) petitioner pled guilty to specific facts and unequivocally denied others with the understanding that what he pled to, and specifically stated he was not pleading to, would produce a sentence of between 10-13 years and the court accepted the plea "as stated" with no objection by the government; and (b) the court did not inquire of petitioner or give him any warnings or advisement with respect to his expectations as to what the sentence he would receive might be or otherwise indicate that the sentence increasing facts petitioner refused to plead to and unequivocally denied could later be visited and work to his disadvantage?

2. Was a "binding plea" type of situation warranting application of the specific performance principles annunciated by this Court in *Santobello v. New York* created by petitioner's guilty plea in this case which was entered without a written plea agreement but tailored, during the plea hearing, to specific facts with the expectation that he would receive a sentence of between 10-13 years, and which plea was accepted by the court "as stated" with no objection by the government after the court expressly noted the parameters of defendant's plea and specifically inquired if the government was satisfied with the same?

QUESTIONS PRESENTED – Continued

3. Did the district court violate the parameters of this Court's decision in *United States v. Booker* when it imposed a sentence upon petitioner based on facts he did not admit and facts he specifically denied during his guilty plea hearing?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. The Charges	2
B. Petitioner's Guilty Plea	2
C. Petitioner's Sentence	5
D. Appeal	6
REASONS WHY THE WRIT SHOULD ISSUE	7
I. PETITIONER'S GUILTY PLEA AND 540 MONTH SENTENCE IS NOT CONSTITUTIONAL BECAUSE: (A) PETITIONER PLED GUILTY TO SPECIFIC FACTS AND UNEQUIVOCALLY DENIED OTHERS WITH THE UNDERSTANDING THAT WHAT HE PLED TO, AND SPECIFICALLY STATED HE WAS NOT PLEADING TO, WOULD PRODUCE A SENTENCE OF BETWEEN 10-13 YEARS AND THE COURT ACCEPTED THE PLEA "AS STATED" WITH NO OBJECTION BY THE GOVERNMENT; AND (B) THE COURT DID NOT INQUIRE OF PETITIONER OR GIVE HIM ANY WARNINGS	

TABLE OF CONTENTS – Continued

Page

OR ADVISEMENT WITH RESPECT TO HIS EXPECTATIONS AS TO WHAT THE SENTENCE HE WOULD RECEIVE MIGHT BE OR OTHERWISE INDICATE THAT THE SENTENCE INCREASING FACTS PETITIONER REFUSED TO PLEAD TO AND UNEQUIVOCALLY DENIED COULD LATER BE VISITED AND WORK TO HIS DISADVANTAGE.... 7

II. A "BINDING PLEA" TYPE OF SITUATION WARRANTING APPLICATION OF THE SPECIFIC PERFORMANCE PRINCIPLES ANNUNCIATED BY THIS COURT IN *SANTOBELLO V. NEW YORK* *WAS* CREATED BY PETITIONER'S GUILTY PLEA IN THIS CASE WHICH WAS ENTERED WITHOUT A WRITTEN PLEA AGREEMENT BUT TAILORED, DURING THE PLEA HEARING, TO SPECIFIC FACTS WITH THE EXPECTATION THAT PETITIONER WOULD RECEIVE A SENTENCE OF BETWEEN 10-13 YEARS, AND WHICH PLEA WAS ACCEPTED BY THE COURT "AS STATED" WITH NO OBJECTION BY THE GOVERNMENT AFTER THE COURT EXPRESSLY NOTED THE PARAMETERS OF DEFENDANT'S PLEA AND SPECIFICALLY INQUIRED IF THE GOVERNMENT WAS SATISFIED WITH THE SAME 11

TABLE OF CONTENTS – Continued

Page

III. THE DISTRICT COURT VIOLATED THE PARAMETERS OF THIS COURT'S DECISION IN *UNITED STATES V. BOOKER* WHEN IT IMPOSED A SENTENCE UPON PETITIONER BASED ON FACTS HE DID NOT ADMIT AND FACTS HE SPECIFICALLY DENIED DURING HIS GUILTY PLEA HEARING 13

CONCLUSION 14

APPENDIX

Court of Appeals opinion ..... App. 1

District Court judgment ..... App. 39

District Court oral ruling ..... App. 48

Court of Appeals denial of rehearing ..... App. 90

TABLE OF AUTHORITIES

Page

CASES

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) 7, 8

Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) 8

McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) 7

Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) 11, 12

United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) 13, 14

United States v. White, 582 F.3d 787 (7th Cir. 2009) 1

STATUTES

21 U.S.C. § 846 2

28 U.S.C. § 1254(1) 1

RULES

Federal Rule of Criminal Procedure 11(c) 7

Federal Rule of Criminal Procedure 11(c)(1)-(5) 7

Federal Rule of Criminal Procedure 11(c)(1)(C) 12

Federal Rule of Criminal Procedure 11(c)(2) 11, 12

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Article III 1

Fifth Amendment 1

OPINIONS BELOW

The September 29, 2009 decision of the United States Court of Appeals for the Seventh Circuit in this case appears at App. 1-38 and is reported as *United States v. White,* 582 F.3d 787 (7th Cir. 2009). The Seventh Circuit's order denying rehearing on December 3, 2009 appears at App. 90 to this petition and is unreported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit rendered its decision in this case on September 29, 2009, and denied rehearing on December 3, 2009. This Court's jurisdiction is invoked under Article III of the Constitution of the United States, and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .

Federal Rule of Criminal Procedure 11

STATEMENT OF THE CASE

A. The Charges

On May 12, 2004 Marvel Thompson ("petitioner"), was arrested pursuant to a federal criminal complaint. A multi-count indictment charging petitioner and numerous other individuals with various offenses was returned by a federal grand jury in the Northern District of Illinois on August 31, 2004. Petitioner was charged only in Count One with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, more than 1 kilogram of heroin, more than 50 grams of cocaine base, and marijuana, in violation of 21 U.S.C. § 846.

A superseding indictment was returned on February 8, 2005 charging petitioner and 45 others with various offenses. Petitioner was still only charged in Count One with the identical drug conspiracy charge he was initially indicted for.

B. Petitioner's Guilty Plea

On March 29, 2005 petitioner appeared in the United States District Court for the Northern District

of Illinois before Judge Elaine E. Bucklo to enter a guilty plea. Petitioner made it abundantly clear during his change of plea hearing that he would not sign the written plea agreement the government had drafted since it was inaccurate and provided for a sentence unacceptable to petitioner. (App. 57) ("Your Honor, I want to plead guilty to the things that I done, and things in that plea [agreement] I can't plead guilty to because I didn't do it. So, I mean, whatever I've done and it's in Count 1 then, I'll plead guilty to it, but I just can't sign that plea [agreement].").[1]

Petitioner's counsel explained to the court that petitioner wanted to "plead guilty to Count 1, but there are certain particulars to it as to what his involvement were in that specific count." (App. 60). Counsel further explained that petitioner would plead to "[f]ive kilos of cocaine, one kilo of heroin, but he does not acknowledge the crack cocaine as charged in the indictment." (App. 61). The government had no objection to those limitations that varied from its indictment, and it represented to the court that "that would be sufficient to take [petitioner's] plea." *Id.*

Counsel for petitioner named the specific conspirators charged in Count 1 that petitioner acknowledged his involvement with. (App. 61-62). Before

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[1] Cites preceded by "App." are to pages of the appendices to this petition.

proceeding the court assured itself that the government understood the limitations petitioner was placing on his culpability with respect to the charge he was pleading to and again, there was no objection from the government. (App. 62-63).

Later in the hearing when the court asked the government to put forth its factual summary of the case, (App. 74-77), petitioner hastened to state: "I don't plead guilty to all that. I can't do that." (App. 77-78).

Petitioner then summarized the extent of his specific involvement and his role in the offense by: (1) stating the precise quantities of cocaine and heroin he was accountable for; (2) stating the time-period he was involved; (3) naming the people his involvement was limited to; and (4) unequivocally denying the leadership role the government sought to attribute to petitioner in its factual summary. (App. 77-81). The court then asked the government if it was accepting petitioner's plea "[a]s he has stated it[,]" and specifically advised the government that petitioner was "disagreeing to some of what you [the prosecutor] said." (App. 81). The government had no objection. *Id.*

To further ensure that there was no misconception as to what he was pleading guilty to, petitioner stated again that he was only pleading guilty "to the things that I have done." (App. 82). The government again did not object. *Id.*

When the court later asked petitioner if he was pleading guilty to "the facts you have stated[,]" petitioner answered: "Yes, to the facts that I have stated, I'm pleading guilty to that." (App. 84). The government did not object. *Id.* The court accepted petitioner's plea with the specific caveat that petitioner was "in fact guilty of Count 1 of the superseding indictment *as stated* by [petitioner] here and to the facts [petitioner] stated. . . ." (App. 85). (Emphasis supplied). The government did not object or otherwise take exception with respect to the court's caveat. *Id.*

The change of plea record also reflects that there was no advisement given to petitioner that any projections or expectations he may have formed as to what his sentence might be given the parameters of what he specifically pled guilty to, and specifically denied, were not binding on the court and that he could be sentenced to a more lengthy term of imprisonment than what he may have expected per the parameters set by his plea. (App. 44-89). Nor was petitioner advised that he would not have a right to withdraw his plea if the court sentenced him to a more lengthy term of imprisonment than he expected to receive. *Id.*

C. Petitioner's Sentence

The district court conducted a sentencing hearing that spanned two days. Contrary to the parameters of petitioner's guilty plea, the district court ultimately

made the following findings and adjustments at petitioner's sentencing: (1) that a four-level enhancement applied because petitioner was a leader/organizer (which petitioner expressly disavowed during his plea without objection); (2) that a two-level dangerous weapon enhancement applied (which was not an issue during petitioner's plea); (3) that a two-level obstruction of justice enhancement applied (based on petitioner's un-objected to disavowal of the leadership role during petitioner's change of plea hearing); and (4) that petitioner was not entitled to acceptance of responsibility (based on petitioner's un-objected to disavowal of leadership). (App. 6-16).

The district court imposed a principal sentence of 540 months imprisonment, *i.e.*, more than four times the 10-13 year sentence petitioner expected to be imposed per the accepted and un-objected to parameters of his plea.

D. Appeal

Without addressing the obvious constitutional issues inherent in the unique factual setting of the guilty plea in this case, the Seventh Circuit affirmed the district court's sentence. (App. 6-16). Petitioner now seeks a writ of certiorari in this Court to air those important constitutional questions.

REASONS WHY THE WRIT SHOULD ISSUE

I. PETITIONER'S GUILTY PLEA AND 540 MONTH SENTENCE IS NOT CONSTITUTIONAL BECAUSE: (A) PETITIONER PLED GUILTY TO SPECIFIC FACTS AND UNEQUIVOCALLY DENIED OTHERS WITH THE UNDERSTANDING THAT WHAT HE PLED TO, AND SPECIFICALLY STATED HE WAS NOT PLEADING TO, WOULD PRODUCE A SENTENCE OF BETWEEN 10-13 YEARS AND THE COURT ACCEPTED THE PLEA "AS STATED" WITH NO OBJECTION BY THE GOVERNMENT; AND (B) THE COURT DID NOT INQUIRE OF PETITIONER OR GIVE HIM ANY WARNINGS OR ADVISEMENT WITH RESPECT TO HIS EXPECTATIONS AS TO WHAT THE SENTENCE HE WOULD RECEIVE MIGHT BE OR OTHERWISE INDICATE THAT THE SENTENCE INCREASING FACTS PETITIONER REFUSED TO PLEAD TO AND UNEQUIVOCALLY DENIED COULD LATER BE VISITED AND WORK TO HIS DISADVANTAGE

Federal Rule of Criminal Procedure 11(c) sets forth the content of the colloquy the court must engage in with a defendant before accepting a guilty plea. *See,* Fed.R.Crim.P. 11(c)(1)-(5). The provisions therein are, in part, constitutionally required by this Court's decisions in *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and *McCarthy*

v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

This Court has recognized long ago that "a guilty plea is a grave and solemn act to be accepted only with care and discernment" and it "must be [a] knowing, intelligent act[ ] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

If a guilty plea is not both knowing and voluntary, it has been obtained in violation of the Fifth Amendment's due process requirement and is therefore invalid. *Boykin,* 395 U.S., at 243-44.

Here, petitioner unequivocally stated that he was not pleading guilty to the factual summary put forth by the government. Petitioner then stated what he was willing to plead guilty to, which entailed a specific quantity of cocaine, a limitation of involvement to only two specific individuals during a specific time-period, and an unequivocal denial of the leadership role the government sought to attribute to petitioner. (App. 77-81).

Petitioner's specifically tailored plea was accepted by the court "as stated" by petitioner after the court made sure that the government understood the limitations petitioner placed on his plea, and the government did not object to petitioner's limitations or the court's acceptance of the plea "as stated."

Petitioner researched his sentencing exposure prior to pleading and it was his understanding, based on what he specifically pled to, that he would be sentenced to no more than 13 years imprisonment for the conduct he specifically pled to. Because the court accepted the plea "as stated" and because the government did not object to the parameters set by petitioner's plea or the court's acceptance of the same "as stated" by petitioner, and especially because there was no advisement or warning given to petitioner with respect to his understanding as to what the ultimate sentence might be; the 45 year sentence imposed upon petitioner is violative of due process in the most fundamental sense. That is especially so in view of the fact that the 45 year sentence is entirely based on the matters petitioner unequivocally stated he would not plead guilty to, *i.e.*, a higher quantity and different types of controlled substances, a weapons enhancement, and a leadership enhancement (which resulted in the additional enhancements for obstruction of justice and a withholding of acceptance of responsibility points).

The government cannot constitutionally be permitted to agree to a plea being accepted in the very specific, and unique, manner that took place here, only to sandbag the petitioner at sentencing by arguing for a sentence based on the matters it knew petitioner was not including in his plea, especially since the record reveals that petitioner would not have pled guilty had he been informed that those matters he specifically refused to include in his plea

could be visited at sentencing and work to his disadvantage.

This Court should grant certiorari to resolve the important due process question presented by the highly unique facts and circumstances surrounding petitioner's specifically tailored and accepted guilty plea since the lack of advisement or warning to petitioner with regard to his understanding and expectation as to the sentence he believed would be imposed is absent from the record, and the record amply demonstrates that petitioner would not have pled guilty had he been informed that the facts he refused to plead to could be visited and work to his disadvantage at sentencing.

II. A "BINDING PLEA" TYPE OF SITUATION WARRANTING APPLICATION OF THE SPECIFIC PERFORMANCE PRINCIPLES ANNUNCIATED BY THIS COURT IN *SANTOBELLO V. NEW YORK* WAS CREATED BY PETITIONER'S GUILTY PLEA IN THIS CASE WHICH WAS ENTERED WITHOUT A WRITTEN PLEA AGREEMENT BUT TAILORED, DURING THE PLEA HEARING, TO SPECIFIC FACTS WITH THE EXPECTATION THAT PETITIONER WOULD RECEIVE A SENTENCE OF BETWEEN 10-13 YEARS, AND WHICH PLEA WAS ACCEPTED BY THE COURT "AS STATED" WITH NO OBJECTION BY THE GOVERNMENT AFTER THE COURT EXPRESSLY NOTED THE PARAMETERS OF DEFENDANT'S PLEA AND SPECIFICALLY INQUIRED IF THE GOVERNMENT WAS SATISFIED WITH THE SAME

Fed.R.Crim.P. 11(c)(2) requires that the terms of a plea agreement be fully disclosed to the judge taking the plea in open court. *Id.* Here there was no written plea agreement. However, petitioner set forth his factual summary of his involvement, culpability, and role in the offense. (App. 77-81). There was no objection by the government to petitioner's factual summary, and no objection to the court accepting petitioner's plea with the specific caveat that the plea was being accepted "as stated" by petitioner. (App. 85).

Although there was no "agreement" of the nature contemplated by Rule 11(c)(2), petitioner's plea to the specific matters he stated in open court cannot reasonably be construed as anything less than his disclosure to the court of the terms under which he was willing to plead guilty.

Such is plainly supported by petitioner's statement after the government put forth its factual summary. (App. 77-78) ("I don't plead guilty to all that. I can't do that."). Thus, the record plainly reveals that petitioner would not have pled guilty had he been required to accept the factual parameters as put forth by the government.

Add to that the fact that the government did not at all object to the parameters of what petitioner expressly stated that he was pleading guilty to and not pleading to, even after the court advised the government of petitioner's parameters and gave the government an opportunity to reject petitioner's offer to plead guilty; and it becomes clear that what transpired in open court during petitioner's change of plea hearing cannot be construed as anything less than a plea agreement within the meaning of Rule 11(c)(1)(C), albeit an unwritten one.

Since the court accepted petitioner's plea with the specific parameters set by petitioner, and without government objection, this Court's "specific performance" doctrine as outlined in *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), should govern the situation presented by the unique

plea involved in this case that if adhered to would produce a sentence of 10-13 years versus the 45 imposed. This Court should grant certiorari to address that question.

III. THE DISTRICT COURT VIOLATED THE PARAMETERS OF THIS COURT'S DECISION IN *UNITED STATES V. BOOKER* WHEN IT IMPOSED A SENTENCE UPON PETITIONER BASED ON FACTS (HE DID NOT ADMIT AND FACTS HE SPECIFICALLY DENIED DURING HIS GUILTY PLEA HEARING

In United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), this Court held that the Sentencing Guidelines applicable to a particular offense constitute the statutory maximum in federal sentencing, *id.* 543 U.S., at 233-43, and it reaffirmed that any enhancing factors provided by the guidelines can only be based on what is "admitted by the defendant or proved to a jury beyond a reasonable doubt." 543 U.S., at 244.

Petitioner's sentence is based entirely on facts he did not admit, and more importantly, facts that he *unequivocally denied* to such an extent that he made it abundantly clear that he would not plead guilty if those facts had to be pled to. (App. 77-8) (I don't plead guilty to all that. I can't do that.").

Moreover, petitioner was aware of this Court's decision in *Booker* prior to pleading and he was not

advised during his plea hearing that any enhancing factors, especially factors he unequivocally denied, could be visited and work to his disadvantage at his sentencing. Petitioner thus had every right to expect that the spirit and intent of this Court's decision in *Booker* would be respected and applied in this case.

Had the dictates of *Booker* been adhered to, the facts petitioner pled to would have produced a sentence of between 10-13 years versus the 45 years imposed. In view of the added dimensions presented by the unique plea in this case, this Court should grant certiorari to determine whether petitioner's sentence runs afoul of *Booker*. Alternatively, this Court should grant certiorari, vacate, and remand to the Seventh Circuit for a more meaningful analysis under *Booker*.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to address the important constitutional questions presented by the unique plea in this case.

Dated: April 26, 2010

Respectfully submitted,

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582 F.3d 787

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Derrick WHITE, Melvin Herbert, James Stewart, Corey Evans, and Marvel Thompson,
Defendants-Appellants.
Marvel Thompson, Plaintiff-Appellant,
v.
United States of America, Defendant-Appellee.
Nos. 06-3574, 06-4038, 06-4067, 06-4171, 07-2086 09-1285.

Argued Sept. 26, 2008.
Submitted April 28, 2009*.

Decided Sept. 29, 2009.

Christopher R. McFadden (argued), Joseph Alesia, Edmond E-Min Chang, Office of the United States Attorney, Chicago, IL, for United States of America.

Michael I. Leonard (argued), Meckler, Bulger & Tilson, Chicago, IL, for Derrick White.

Richard H. Parsons, Johanna M. Christiansen (argued), Office of the Federal Public Defender, Peoria,

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* After examining the briefs and the record, we have concluded that oral argument in No. 09-1285 is unnecessary. That appeal – involving Thompson's challenge to the district court's order denying his motion under Rule 41(g) of the *Federal Rules of Criminal Procedure* – is consolidated with Thompson's merits appeal and submitted on the briefs and the record. *See* FED. R.APP. P. 34(a)(2).

IL, Matthew J. McQuaid, Chicago, IL, for Melvin Herbert.

Judith E. Olingy, University of Wisconsin Law School, Madison, WI, William O. Walters, Mt. Prospect, IL, for James Stewart.

Robert A. Handelsman, James A. McGurk, Chicago, IL, Susan Kister, St. Louis, MO, for Corey Evans.

Andrea E. Gambino (argued), Gambino & Associates, Chicago, IL, for Marvel Thompson.

Before RIPPLE, MANION, and SYKES, Circuit Judges.

SYKES, Circuit Judge.

The five defendants in these consolidated appeals participated in a long-running conspiracy involving the distribution of vast amounts of cocaine, heroin, and marijuana by the Black Disciples street gang in Chicago. Derrick White was convicted following a jury trial, and on appeal he challenges various aspects of his trial. The other four defendants – Melvin Herbert, James Stewart, Corey Evans, and Marvel Thompson – pleaded guilty, and they each (with the exception of Evans, whose attorney has filed an *Anders* brief) challenge their sentences. We conclude that Stewart is entitled to a remand for resentencing in light of *Kimbrough v. United States,* 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007). As to the other defendants, we affirm.

We delayed issuing our decision in these appeals because while they were pending, Thompson filed a motion under Rule 41(g) of the *Federal Rules of Criminal Procedure* asking the district court to order the government to return more than $300,000 in property it seized when it raided Thompson's residence and business. The district judge denied the motion without prejudice, indicating that after Thompson's merits appeal was decided, she would "promptly decide" a renewed motion. Thompson appealed this order, claiming that the district court should not have denied his Rule 41(g) motion and asking us to order that it be reassigned to a new judge on remand. We dismiss this appeal for lack of jurisdiction because the district court's order was not final. To the extent Thompson seeks reassignment of his Rule 41(g) motion to another judge, we construe his appeal as a petition for mandamus and deny it.

I. Background

The Black Disciples street gang operated a massive drug-trafficking organization in Chicago between 1989 and 2004. One of the largest gangs in the city, the Black Disciples financed most of their activities by selling enormous quantities of cocaine, heroin, and marijuana in housing projects and elsewhere on Chicago's South and West Sides. The Black Disciples prevented nongang members from selling drugs in areas the gang controlled unless those outsiders paid "street taxes." Money obtained from drug sales and street taxes was laundered through

real estate, jewelry, businesses, and vehicles obtained by gang members as part of the conspiracy. Most of the gang's drug-distribution activities occurred in the Englewood neighborhood on Chicago's South Side and public-housing projects on Chicago's South and West Sides.

The Black Disciples embraced a rigid hierarchical leadership structure. A "king" served as the leader of the Black Disciples and was responsible for developing gang policy and directing the gang's drug-trafficking operations. Marvel Thompson served as king of the Black Disciples from the early 1990s until 2003, at which point the gang shifted to a three-king leadership structure. "Board members" ranked just below the "kings" in the Black Disciples' hierarchy. The king assigned each board member to a specific geographic area, and board members oversaw the gang's narcotics operations in their areas of authority. Lower-ranking gang members paid board members street taxes in exchange for the right to sell drugs within the board member's area of control.

The Black Disciples protected their drug-trafficking activities by using younger gang members to provide security. The Black Disciples frequently posted gang members at housing projects that served as headquarters for the gang's drug-dealing activities. These gang members carried guns distributed by the gang and were assigned to protect the Black Disciples' activities from interference by the police or other rival gangs. The gang also protected its drug operation by intimidating witnesses, shooting at

police officers, and collecting debts through violent means.

As part of the gang's narcotics-trafficking operation, Black Disciples held frequent meetings to discuss the gang's drug-distribution network and fashion rules, and to decide how to provide security for important gang members and their drug activities. One gang rule called "Aid and Assistance" required all Black Disciples members to automatically and immediately assist any other member when asked for any purpose. Another rule called "Code of Silence" prohibited Black Disciples members from discussing gang business with nongang members. At the meetings gang members decided how to discipline members for violations of these and other rules. For example, if a gang member stole drugs or drug proceeds, cooperated with law enforcement, or failed to follow orders, he could be fined, beaten, shot, or killed.

On February 8, 2005, a grand jury sitting in the Northern District of Illinois returned a 49-count indictment against 46 defendants stemming from their involvement in the Black Disciples' drug-distribution network. Count 1, the centerpiece of the indictment, accused 45 of the defendants of conspiring to possess and distribute more than 50 grams of crack cocaine, more than 5 kilograms of powder cocaine, and more than 1 kilogram of heroin. Forty-five of the defendants pleaded guilty to various charges in the indictment; the forty-sixth defendant – Derrick White – was convicted after a jury trial of

four offenses. Given the sprawling scope of this case, the number of defendants, and the variety of issues each defendant raises on appeal, we save our description of each defendant's individual involvement with the Black Disciples' drug conspiracy for our analysis below.

II. Analysis

A. Marvel Thompson

Marvel Thompson was the king of the Black Disciples from the early 1990s until 2003, when the gang embraced a three-king leadership structure that left Thompson in charge of the gang's South Side operation. As a king Thompson directed the Black Disciples' vast drug-trafficking operations and controlled other gang members' activities. Thompson pleaded guilty to the conspiracy charge in the indictment. His presentence report ("PSR") placed him in Criminal History Category I, and his adjusted offense level was 46 under the sentencing guidelines (the sentencing table tops out at 43); this yielded an advisory guidelines sentence of life imprisonment. He was sentenced to 540 months in prison.

On appeal Thompson argues that the district court committed several errors in the application of guidelines enhancements and that his sentence is

otherwise unreasonable.[1] He first argues that the district court erred when it applied a four-level enhancement for being an "organizer or leader" of the conspiracy. U.S.S.G. § 3B1.1(a). The gist of Thompson's argument is that the government only established that he was a leader of the Black Disciples gang, not a leader of the drug conspiracy. To the contrary, the government presented substantial evidence that as king of the Black Disciples, Thompson coordinated the drug-distribution conspiracy. Thompson's sentencing hearing spanned two days, and nine different coconspirators testified that Thompson was the king of the Black Disciples and was extensively involved in directing the gang's narcotics operation. They testified that Thompson controlled the entire Black Disciples organization, provided drugs to gang members to sell, controlled more than 15 drug-selling locations, made thousands of dollars a day from drug sales, collected payments from street-level drug dealers, laundered drug money through real estate he owned, resolved disputes among gang members, and disciplined Black Disciples members who broke gang rules. The government also introduced evidence seized from Thompson's apartment, which included several handguns, gang literature, more

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[1] Thompson also argues that the district court violated the Due Process Clause because it did not require the government to prove beyond a reasonable doubt the sentencing facts it relied on to increase his sentence. We have rejected this argument many times. *See, e.g., United States v. Santiago,* 495 F.3d 820, 824 (7th Cir.2007).

than $300,000 in small bills, and letters from other Black Disciples members who acknowledged his leadership role and asked for money or assistance.

Against this mountain of evidence establishing his role as a leader of the Black Disciples' drug conspiracy, Thompson offers two additional arguments, both weak. First, he claims that because much of the evidence was drawn from grand-jury proceedings, the trial of coconspirator Derrick White, plea agreements, and plea colloquies, he did not have the opportunity to challenge it. But the government gave Thompson this evidence well in advance of his sentencing hearing, and he had ample opportunity to contest it during the two-day hearing. Second, Thompson argues that some of the evidence is unreliable. This argument amounts to little more than an invitation to second-guess the district court's factual findings, which are clearly supported by the evidence. The district judge presided over this 46-defendant case for nearly three years and demonstrated intimate familiarity with the substantial evidence that overwhelmingly identified Thompson as a leader of the drug conspiracy. We will "not second guess the determinations made by a judicial officer who has observed the testimony and made careful judgments about the witness' veracity." *United States v. Hollins*, 498 F.3d 622, 631 (7th Cir.2007). The district court did not clearly err in applying the four-level "organizer or leader" enhancement under § 3B1.1(a).

Thompson next argues that the district court clearly erred in applying a two-level enhancement for

possession of a dangerous weapon in connection with a drug-trafficking offense. U.S.S.G. § 2D1.1(b)(1). For purposes of the § 2D1.1(b)(1) enhancement, a defendant "is considered to have 'possessed' a firearm if coconspirators possessed firearms in furtherance of the conspiracy and [the defendant] could have reasonably foreseen the coconspirators' possession." *United States v. Acosta,* 534 F.3d 574, 588 (7th Cir.2008).

There is ample support for the district court's application of the dangerous – weapon enhancement. Law-enforcement officers recovered two loaded guns – along with more than $300,000 in $10 and $20 bills – when they searched Thompson's apartment. One of these guns had its serial number obliterated, which coconspirator Varney Voker explained was a common Black Disciples tactic to prevent the gang's weapons from being traced. Contrary to what Thompson suggests, the government need not always establish the presence of drugs at the same place where the firearm is found to support the dangerous-weapon enhancement; such a showing is a sufficient, but not a necessary, condition. *See, e.g., United States v. Womack,* 496 F.3d 791, 798 (7th Cir.2007).

Even without the guns recovered from his apartment, however, application of the enhancement was justified based on Thompson's leadership role in the Black Disciples. In this regard, Thompson's case is indistinguishable from *United States v. Souffront,* 338 F.3d 809 (7th Cir.2003), a case in which we affirmed the application of the § 2D1.1(b)(1) enhancement to a

drug kingpin when trial testimony revealed that members of the drug conspiracy carried guns and used them for disciplinary and security purposes. Similarly here, the government introduced substantial evidence that the Black Disciples' drug operation relied heavily on gun-carrying gang members to provide security and to discipline out-of-line gang members. Additionally, the Black Disciples controlled the housing project where coconspirator Derrick White shot a police officer; White used a gang-provided firearm while providing security for the drug-trafficking organization Thompson directed. As if more were needed, the evidence also established that Thompson ordered one gang member killed whom he suspected of cooperating with law enforcement and another gang member shot for violating gang rules. The dangerous-weapon enhancement was properly applied.

Thompson also challenges the district court's application of a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1. An obstruction-of-justice enhancement is proper if the defendant commits perjury – that is, if he willfully gives false testimony under oath about a material matter. *United States v. Price,* 516 F.3d 597, 607 (7th Cir.2008). A defendant can obstruct justice by lying about relevant conduct that would enhance his sentence, *see United States v. Kroledge,* 201 F.3d 900, 905 (7th Cir.2000), and that is precisely what the district court concluded occurred in this case. During his plea colloquy, Thompson refused to admit to the

government's assertion that he was a king in the Black Disciples organization, saying, "As far as the kings and all that, that's, that's – I told them a thousand times, that's not me." The government then introduced substantial evidence establishing Thompson's role as a king, and the district court concluded Thompson "absolutely lied" about his role in the Black Disciples.

Thompson raises two challenges to the application of this enhancement: that his statement to the district court during the plea colloquy was not a lie and that it was not material. Regarding the first of these claims, Thompson contends that his statement about his role in the Black Disciples was just his effort to explain to the court that he only led *part* of the gang's operations. He argues that he was only trying to correct the government's erroneous assertion that he was responsible for the coconspirators' activities even though he did not control their geographic area. To the contrary, however, Thompson's statement denying his status as king was in response to a lengthy description by the government of his ascension through the Black Disciples' ranks and its explanation of the Black Disciples' leadership structure. The statement was in the form of a flat denial – "it's not me." The record also reflects that Thompson repeatedly minimized his role with the Black Disciples. We find no fault with the district court's finding that Thompson lied.

Nor are we convinced that Thompson's lie was immaterial. Numerous courts have held that when a

defendant lies during a plea hearing by attempting to minimize his role in an offense, that lie is material for purposes of § 3C1.1. *See, e.g., United States v. Sanders,* 162 F.3d 396, 402-03 (6th Cir.1998); *United States v. Hernandez Coplin,* 24 F.3d 312, 317-18 (1st Cir.1994). And we have specifically held that an obstruction-of-justice enhancement is warranted when the defendant minimizes his role in a conspiracy during a sentencing hearing. *See United States v. Sharp,* 436 F.3d 730, 738 (7th Cir.2006). Sentencing courts must consider a defendant's role in a conspiracy when determining whether a § 3B1.1 enhancement or a § 3B1.2 reduction is applicable. Thompson's attempt to mislead the district court about his role within the Black Disciples "[made] it more difficult for the court to give him the sentence that is his just [dessert]." *United States v. Sapoznik,* 161 F.3d 1117, 1121 (7th Cir.1998). Accordingly, the district court did not clearly err in applying the obstruction-of-justice enhancement.

Thompson next claims he is entitled to a reduction under U.S.S.G. § 3E1.1(a) for acceptance of responsibility. When a defendant's offense level is properly enhanced for obstruction of justice under § 3C1.1, he is generally not entitled to a reduction for acceptance of responsibility absent "exceptional circumstances." *United States v. Davis,* 442 F.3d 1003, 1009-10 (7th Cir.2006). We have previously affirmed the denial of a § 3E1.1(a) reduction where the defendant minimizes his role in the offense. *United States v. Linnear,* 40 F.3d 215, 222 (7th Cir.1994).

The district court properly withheld the acceptance-of-responsibility reduction. Thompson lied about his role as king of the Black Disciples and disputed the degree to which he engineered the gang's drug-trafficking operations. Furthermore, although the evidence overwhelming revealed that he directed a massive drug organization for approximately 15 years, the only drug transactions Thompson actually admitted were a 2004 purchase of 150 grams of heroin and a 2004 sale of 1 kilogram of heroin and 28 kilograms of cocaine. Even more incredulously, Thompson initially testified that he had no idea what his coconspirators were going to do with the drugs he sold them on those occasions and revised his statement only after the district court expressed understandable skepticism.

Skeletal admissions and minimization generally undermine a defendant's argument for a § 3E1.1(a) acceptance-of-responsibility reduction; when combined with the obstructive conduct that led to the application of a § 3C1.1 enhancement for obstruction of justice, Thompson's argument for an acceptance-of-responsibility enhancement evaporates. To the extent Thompson contends that the government agreed to a § 3E1.1(a) reduction, he severely distorts the record. Although the government said it would recommend an acceptance-of-responsibility reduction if Thompson pleaded guilty by a certain date (and he did), prosecutors were not bound by this agreement after Thompson lied about his role in the Black Disciples' drug conspiracy at his change-of-plea and sentencing

hearings. Accordingly, the district court properly denied Thompson a § 3E1.1(a) reduction for acceptance of responsibility.

Finally, Thompson challenges his 540-month sentence as unreasonable. He argues that the district court gave too little weight to his lack of a criminal record, his personal characteristics, and his family responsibilities. Thompson also believes that the district court did not adequately explain why it imposed a 45-year sentence on a 37-year-old with no criminal history. When a defendant presents "stock arguments that sentencing courts see routinely," we have said that "a sentencing court is certainly free to reject [them] without discussion." *United States v. Tahzib,* 513 F.3d 692, 695 (7th Cir.2008). Moreover, "arguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence." *United States v. Cunningham,* 429 F.3d 673, 678 (7th Cir.2005).

Here, the district court considered, among other things: (1) the nature and circumstances of the offense, which the court said "could hardly be worse" because it was "a crime against the south side" and "the kind of crime that keeps people from having a chance"; (2) Thompson's role as kingpin of the Black Disciples organization; (3) certain positive aspects of Thompson's character as shown by his leadership qualities, his occasional good deeds, and the fact that his children loved him; (4) the cynical message Thompson sent to children by appearing as a leader of a gang; (5) the need to deter others from selling

drugs and joining street gangs; and (6) the likelihood that Thompson would return to selling drugs upon his release from prison. After commenting on these factors, the court rejected the recommended life sentence, concluding that there was at least a *possibility* of rehabilitation. In short, after an exhaustive two-day sentencing hearing, the district court thoughtfully considered Thompson's individual circumstances before imposing a below-guidelines sentence of 540 months. This was not an abuse of discretion.

B. Melvin Herbert

Melvin Herbert pleaded guilty to the conspiracy count charged in the indictment, admitting that he held a leadership position in the Black Disciples' drug-trafficking operation. The district court found that the total amount of drugs involved in the conspiracy included more than 1.5 kilograms of crack cocaine, 30 kilograms of heroin, and 150 kilograms of powder cocaine. Herbert received guidelines enhancements for possessing a weapon in connection with a drug-trafficking offense and for being a manager or supervisor of criminal activity, and a guidelines reduction for acceptance of responsibility. This brought his advisory guidelines range to 360 months to life imprisonment. The district court imposed a below-guidelines sentence of 310 months.

The sole issue Herbert raises on appeal is whether he is entitled to a remand for resentencing under either *Kimbrough v. United States,* 552 U.S.

85, 128 S.Ct. 558, 169 L.Ed.2d 481, or 18 U.S.C. § 3582(c). Because Herbert did not object to the crack/powder disparity before the district court, we review these forfeited issues for plain error. *See United States v. Taylor,* 520 F.3d 746, 747-48 (7th Cir.2008).

In *Kimbrough* the Supreme Court held that district courts may consider the disparity between the guidelines' treatment of crack cocaine and powder cocaine when fashioning a defendant's sentence. In *United States v. Taylor,* 520 F.3d 746, we adopted a limited-remand procedure for forfeited *Kimbrough*-type arguments to permit the district court to advise us of its inclination to impose a different sentence in light of *Kimbrough*. *Taylor* remands are premised on the notion that we cannot determine from the record whether the district court would have sentenced a defendant differently had it been aware of its discretion to consider the guidelines' disparate treatment of crack and powder cocaine. If the district court tells us it would impose a different sentence, then a *Kimbrough* error occurred; if the sentence would remain the same, then no *Kimbrough* error occurred and a remand for resentencing is not necessary.

Here, unlike in *Taylor,* we need not ask for the district court's view because even if the district court had *ignored* the crack cocaine attributable to Herbert, his guidelines range would remain unchanged. Based on the amount of powder cocaine and heroin involved in this conspiracy, Herbert's base offense level would b the same. At the time of Herbert's sentencing, the 1.5 kilograms of crack cocaine, 30 kilograms of

heroin, and 150 kilograms of powder cocaine attributed to him each resulted in a base offense level of 38. If the district court focused exclusively on the powder cocaine and heroin it attributed to Herbert, it would still start with a base offense level of 38. Accordingly, any *Kimbrough* error that occurred in this case was harmless.

Nor do the retroactive amendments to the crack-cocaine guidelines require a remand in Herbert's case. Under 18 U.S.C. § 3582(c)(2), a defendant who "has been sentenced to a term of imprisonment based on a sentencing range that has been subsequently lowered" by the Sentencing Commission may move the district court for a reduction in his sentence based on the lowered range. A § 3582(c)(2) motion is addressed to the district court in the first instance, not to the court of appeals. In any event, as we have noted, the powder cocaine and heroin attributable to Herbert independently support a base offense level of 38. After applying the appropriate enhancements and reductions, Herbert's guidelines range remains 360 months to life imprisonment.

C. James Stewart

James Stewart pleaded guilty to the conspiracy count charged in the indictment and was sentenced to 292 months' imprisonment. Stewart admitted he sold drugs and worked security for the Black Disciples' narcotics operation. On appeal Stewart challenges the crack-cocaine sentencing ratio the Supreme Court

declared advisory in *Kimbrough*. Unlike Herbert, Stewart preserved this argument in the district court, so our review is plenary, for abuse of discretion. *See United States v. Clanton*, 538 F.3d 652, 659 (7th Cir.2008). We have said that a district court abuses its discretion under *Kimbrough* when it treats the crack/powder disparity as mandatory. *Id.* The district court did so here.

Because a *Kimbrough* error occurred, the government must show that the error was harmless. The government concedes it cannot meet this burden, and we agree. Stewart's PSR attributed 1.5 kilograms of crack cocaine to him. However, neither the plea agreement, the PSR, nor the district court calculated the specific quantity of powder cocaine or heroin attributable to him. Unlike in Herbert's case, we therefore cannot determine whether Stewart's advisory guidelines range would remain the same even if the district court ignored the amount of crack cocaine for which it found him responsible. Accordingly, we vacate Stewart's sentence and remand to the district court for resentencing in light of *Kimbrough*.

D. Derrick White

Derrick White was the only defendant charged in the indictment who exercised his right to a jury trial. He was convicted of four counts: (1) the conspiracy charge; (2) shooting and attempting to murder a Chicago police officer for the purpose of maintaining

and increasing his position in an enterprise engaged in racketeering activity; (3) carrying and using a gun during a violent crime; and (4) possession of a firearm by a felon. The district court sentenced White to 372 months' imprisonment, and he does not challenge his sentence.

White served as a soldier in the Black Disciples' narcotics enterprise, in which capacity he acted as a lookout at the gang's drug-dealing locations to warn about possible interference by the police or rival gang members. In 2001 White was working security at one of the high-rise housing projects the Black Disciples used as a drug-distribution site. On the night of May 8, 2001, undercover officers from the Chicago Police Department approached the building where White was stationed to conduct a "reverse sting," meaning they would arrest drug dealers when they arrived, then pose as the dealers and arrest anyone who tried to purchase narcotics from them.

Dressed as a construction worker, Officer Deon Hughes drove a U-Haul truck toward the building and got out of the vehicle. As he did so, White approached, frisked him, felt Hughes's bulletproof vest, and yelled, "5-0" (gang code for the police). Hughes then identified himself as a police officer, and White reached into his waistband for a gun. Hughes punched White in the face and tried to run to the front of the U-Haul for cover, but White got off three shots. Two of the bullets hit Hughes, one in his lower back and one in his spine. Had Hughes not worn a bulletproof vest, the shot to his spine would have

killed him. White fled the scene, but based on a description Hughes provided other officers as he lay injured, police later apprehended him.

White first argues that prosecutors impermissibly used a peremptory challenge to strike an African-American juror on the basis of her race contrary to *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). During jury selection, the district court informed potential jurors that the trial might last a week and a half and asked whether this schedule posed problems for any of them. Two women raised their hands and said they had child-care difficulties. Marcy DeVries, a white woman, said she had three children and she might have trouble finding someone to care for her children for an extended period of time. Vicki Jackson, an African-American woman, said she had nine children and that two were "sickly" so she needed to be available in case they had to go to the doctor. Jackson acknowledged, however, that her mother could take care of her children if necessary. When the district court entertained challenges for cause, White's attorney asked that DeVries be struck for cause because of her child-care problem. Noting that both Jackson and DeVries had child-care issues, the prosecutor responded that they should either both be retained or both be dismissed for cause.

The district court ultimately concluded that Jackson and DeVries should not be dismissed for cause. The resulting jury pool at this stage included five African-Americans. Exercising peremptory challenges,

prosecutors struck five whites (including DeVries) and three African-Americans (including Jackson).[2] The resulting jury included one African-American as a regular juror (Juanita Bradley) and one African-American as an alternate juror (Tammi Sherina Pierre-Pierre).

White's counsel then raised a *Batson* challenge to the government's use of a peremptory challenge against Jackson. The prosecutor responded that he struck both DeVries and Jackson because of child-care concerns. The government also proposed that the court promote alternative juror Pierre-Pierre to the regular jury so that there would be two African-Americans on the jury rather than one. White agreed to this suggestion. In light of the government's willingness to substitute an African-American alternate for a white juror, the district court concluded no *Batson* violation occurred. Following trial, the district court briefly revisited the *Batson* issue and reaffirmed its early decision.

On appeal, the government initially argues that White waived his *Batson* challenge. Because White's attorney agreed to the suggestion that alternate juror Pierre-Pierre be promoted to the regular jury, the government argues that White's attorney made a strategic waiver of White's *Batson* challenge. *See United States v. Jaimes-Jaimes*, 406 F.3d 845, 848

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[2] The government's dismissal of the other two African-Americans is not at issue in this case.

(7th Cir.2005) ("There may be sound strategic reasons why a criminal defendant will elect to pursue one . . . argument while also choosing to forego another, and when the defendant selects as a matter of strategy, he also waives those arguments he decided not to present."); *see also United States v. Wesley,* 422 F.3d 509, 520-21 (7th Cir.2005) (finding waiver occurred when a defense attorney agreed with the judge's proposed remedy to correct an allegation of juror bias).

We disagree. Both before and after the seating of the alternate juror, White's attorney said that he objected to the dismissal of Jackson. Although White's attorney agreed to the government's proposal regarding the alternate, there is no indication this was a knowing and intentional decision to set aside White's *Batson* challenge. We have said that "[w]aiver principles should be construed liberally in favor of the defendant." *Jaimes-Jaimes,* 406 F.3d at 848. White's acceptance of the government's proposal to substitute the African-American alternate for a white juror did not amount to a waiver of his *Batson* challenge.

Though not waived, the *Batson* challenge was properly rejected. Under *Batson* when the government offers a race-neutral reason for dismissing a juror, the defendant must establish that proffered reasons are pretext for a discriminatory strike. *See United States v. Hendrix,* 509 F.3d 362, 370 (7th Cir.2007). Although the defendant is usually required to establish a prima facie case that the government excluded a juror because of her race, when the district

court rules on whether the government's race-neutral justification was pretextual, as it did here, we treat the prima facie requirement as moot. *See United States v. White,* 416 F.3d 634, 640 (7th Cir.2005). We review the district court's findings for clear error. *United States v. Taylor,* 509 F.3d 839, 843 (7th Cir.2007).

We first note that prosecutors advanced a race-neutral reason for dismissing Jackson: her child-care concerns. Race-neutral reasons can include a concern that certain jurors "would not be able to give their full attention to a week-long trial." *United States v. Williams,* 934 F.2d 847, 849 (7th Cir.1991). A juror who worries that her children are not adequately being cared for may not be able to give her full attention to a trial that lasts for more than a few days. This is a plausible race-neutral concern even if the juror can arrange for others to take care of her children; here, Jackson raised an issue about the unique medical needs of two of her children.

Because the government advanced a race-neutral justification, *Batson*'s burden-shifting approach proceeds to the determination of whether the asserted race-neutral reason was simply pretext for an impermissible racial motive. During a *Batson* pretext inquiry, the court looks to "whether a strike was racially motivated" and examines the "*honesty* – not the accuracy – of a proffered race-neutral explanation." *Lamon v. Boatwright,* 467 F.3d 1097, 1101 (7th Cir.2006); *see also United States v. George,* 363 F.3d 666, 674 (7th Cir.2004) (explaining that under

Batson, "the government's proffered reason for the strike need not be particularly persuasive, or even based on quantifiable data, so long as it is not pretextual").

White argues that the government's decision to defend its use of a peremptory strike against Jackson on the same grounds – child-care concerns – that it opposed her for-cause dismissal suggests that the government acted with an impermissible racial motive. But the government opposed the for-cause dismissal of *both* DeVries *and* Jackson on these grounds, arguing that they should either both remain in the jury pool *or* both be removed. The court kept them both in the pool, and prosecutors then used two peremptory challenges to remove them both. At all stages of the jury-selection process, then, the prosecution treated Jackson and DeVries equally based on their expressed concerns about their child-care obligations. This is the converse of the situation the Supreme Court found problematic in *Miller-El v. Dretke*, where "a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve." 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). Prosecutors here struck both jurors who raised child-care issues – one white and one African-American – based on a concern that their attention might be diverted from their responsibilities as jurors.

Other factors confirm the prosecutors' nondiscriminatory intent. We have previously noted that prosecutors likely harbor no discriminatory intent

when minority jurors are empaneled even though prosecutors still had peremptory challenges remaining. *See United States v. Nichols,* 937 F.2d 1257, 1264 (7th Cir.1991). Although the prosecutors used all of their peremptory challenges here, the resulting jury had one African-American, and the government proposed substituting an African-American alternate for a white juror to increase the presence of minorities on the jury. Under these circumstances, the district court did not clearly err in rejecting White's claim of pretext under *Batson. See also United States v. Griffin,* 194 F.3d 808, 826 (7th Cir.1999) (declaring that when the government advances a race-neutral justification, "we have 'no basis for reversal on appeal unless the reason given is completely outlandish or there is other evidence which demonstrated its falsity'" (quoting *Morse v. Hanks,* 172 F.3d 983, 985 (7th Cir.1999))).

White next challenges the sufficiency of the evidence that he was a member of the Black Disciples' drug conspiracy or knowingly committed any acts in furtherance of the conspiracy. On a sufficiency-of-the-evidence challenge, we view the evidence in the light most favorable to the prosecution and will not reverse a conviction unless "'[no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Carrillo,* 435 F.3d 767, 775 (7th Cir.2006) (quoting *United States v. Curtis,* 324 F.3d 501, 505 (7th Cir.2003) (alteration in original)). White does not challenge the evidence that he shot Officer Hughes; rather, he

claims that the evidence was insufficient to connect him to the drug-trafficking conspiracy.

To the contrary, the evidence of White's knowing participation in the conspiracy – and the connection between the conspiracy and the shooting – was overwhelming. White admitted in his postarrest statements to police that he was providing security for the Black Disciples' drug activities on the night of the shooting. He told Officer Sheppard, who arrested him, that he was "security," which Sheppard testified generally meant that White was protecting the gang's drug-trafficking operations. In addition, after White was *Mirandized,* he told police he was "working security for the Black Disciple dope operation that evening" but that he didn't know the "names of the people that were out there dealing drugs, any of the Black Disciples." A coconspirator need not know everyone involved in a conspiracy to be a member of it. *United States v. Duran,* 407 F.3d 828, 835-36 (7th Cir.2005). That White disclaimed knowledge of the names of the coconspirators at the scene on the night of the shooting is irrelevant. His own statements undermine his sufficiency-of-the-evidence argument.

And there was much more than White's own statements. Two police officers and one Black Disciples member testified that the housing project where White shot Officer Hughes was known to be controlled by Black Disciples gang members, who distributed drugs there under cover of "security" provided by the gang. Officer Hughes testified that White frisked him when he got out of the U-Haul,

shouted "5-0" (meaning "police") after discovering his bulletproof vest, and fired on him when Hughes announced himself as a police officer. Other witnesses testified that White's behavior in this regard was consistent with the security practices of a Black Disciples gang member. Finally, there was evidence that the guns used by Black Disciples members working "security" for the gang's drug-distribution network were provided by the gang and often had their serial numbers obliterated; White used such a firearm to shoot Hughes. This evidence amply supports the jury's verdict on the conspiracy count.

White also challenges the sufficiency of the evidence on his racketeering conviction. Specifically, White claims the government failed to prove the Black Disciples were engaged in interstate commerce or that the gang's activities affected interstate commerce. We have said that to prove the interstate-commerce element of a racketeering offense, the government need only show "[a] minor or minimal influence on interstate commerce," such as a drug-dealing organization obtaining drugs from outside the state. *United States v. Farmer,* 924 F.2d 647, 651 (7th Cir.1991). Here, the government called a Drug Enforcement Administration ("DEA") agent to testify that all illegal cocaine and heroin, and the drugs seized from street-level drug dealers operating in areas controlled by the Black Disciples, is produced outside Illinois and imported into the state. That testimony is sufficient to establish the requisite link to interstate commerce needed to sustain White's

racketeering conviction; the DEA agent need not specify that the drugs seized in this case traveled in interstate commerce.

White's final sufficiency-of-the-evidence challenge relates to his conviction for possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g)(1). Like his challenge to his racketeering conviction, White claims that the government failed to prove that the weapon he used to shoot Officer Hughes traveled in or affected interstate commerce. At trial an Alcohol, Tobacco, and Firearms ("ATF") agent testified that the Lorcin semiautomatic pistol White possessed and used to shoot Officer Hughes was probably manufactured in either Nevada or California. However, because the firearm's serial number was unreadable, the agent could not determine exactly where it was manufactured or when it entered Illinois.

White tries to compare his case to *United States v. Groves,* 470 F.3d 311 (7th Cir.2006), but the comparison is inapt. In *Groves* an ATF agent testified that in Indiana there were no "major manufacturers" of shotguns – the type of weapon the defendant in that case possessed. *Id.* at 324. We reversed the conviction, holding that the agent's testimony was "too vague to support proof of this element beyond a reasonable doubt" because it was not clear what the agent meant by "major" shotgun manufacturers and he was never asked about the likelihood that the gun was made in Indiana. *Id.* at 324-28.

This case is far different; the ATF agent's testimony here was much more specific than the agent's testimony in *Groves*. The agent testified that the markings on the pistol were consistent with the firearm having been manufactured in California or Nevada. We have never required prosecutors to prove the precise state of origin to prove the interstate-commerce element of a § 922(g)(1) charge. The dispositive inquiry is whether the gun crossed state lines at some point. Although the markings on the pistol White used to shoot Hughes do not conclusively establish the state where the pistol was manufactured, they do establish that the pistol was manufactured outside of Illinois. Accordingly, the evidence is sufficient to support the jury's verdict on the felon-in-possession count.

Finally, White raises two evidentiary errors that he claims warrant reversal. The first relates to testimony given by Robert Berk, a trace-evidence expert the government called to testify about gunshot-residue evidence. Because White had particles consistent with gunshot residue on his hands, the government called Berk to testify that White could only have acquired the trace elements associated with gunshot residue by firing a weapon. During his direct examination, Berk briefly referred to a "hand blank" study supporting this conclusion. Later, after cross-examination revealed that the particles associated with gunshot residue could come from environmental conditions or some fields of employment, Berk testified on redirect that it was unlikely that the

gunshot-residue particles on White's hands came from these sources.

White argues that this testimony violated Rule 16(a)(1)(G) of the *Federal Rules of Criminal Procedure,* which requires pretrial disclosure of an expert witness's "opinions, the bases and reasons for those opinions, and the witness's qualifications." However, White is required to establish that any Rule 16 violation hampered his opportunity to prepare a defense or that the violation substantially influenced the jury. *See United States v. Stevens,* 380 F.3d 1021, 1026 (7th Cir.2004). He can do neither. He had an opportunity to examine Berk outside of the presence of the jury for more than an hour before trial. His counsel vigorously cross-examined the government's expert, and the testimony he objects to was offered in rebuttal, as a part of Berk's redirect testimony. Moreover, White had his own expert available on this subject whom he chose not to call. White also makes a conclusory argument that Berk's reference to an FBI-authored study in the *Journal of Forensic Science* violated Rules 702 and 703 of the *Federal Rules of Evidence* because the studies were unreliable. There is no support for this assertion. Accordingly, we reject White's claims of evidentiary error.

White next complains that the district court erroneously refused the jury's request for a transcript of the trial testimony of Officer Hughes, a decision we review for abuse of discretion. *United States v. Guy,* 924 F.2d 702, 708 (7th Cir.1991). There was no abuse of discretion here. The district court had previously

rejected a jury request to see the handwritten statement of another witness that helped establish White's connection to the Black Disciples. Later during deliberations the jury asked for a transcript of Officer Hughes's testimony. Again the judge declined the jury's request and instructed jurors to rely on their collective memory of the evidence. This approach to jury questions of this sort is well within the trial court's discretion. *Id.*

Finally, White claims he is entitled to a new trial based on cumulative error. *See United States v. Allen*, 269 F.3d 842, 847 (7th Cir.2001). That doctrine has no application here; we have identified no trial-court errors. *Id.* ("If there are no errors or a single error, there can be no cumulative error.").

E. Corey Evans

Corey Evans pleaded guilty to the conspiracy count and to one count of using a communications facility to distribute narcotics. He admitted he served as a board member in the Black Disciples' narcotics operation, in which capacity he sold drugs and oversaw the gang's drug-selling operation. The district court imposed a sentence of 325 months. His attorney filed an *Anders* brief, and Evans filed a response. Our review is confined to the issues presented in those briefs.

The only potential nonfrivolous basis for appeal was raised in a separate letter submitted by Evans's attorney. In it she notes that the Supreme Court

decided *Kimbrough* after she filed her *Anders* brief and therefore Evans may argue he is entitled to a remand for resentencing. Although Evans preserved this argument in the district court, Evans's circumstances are identical to Herbert's. The district court found Evans responsible for more than 1.5 kilograms of crack cocaine and 30 kilograms of heroin, which supported a guidelines range of 360 months to life. Even if the district court ignored the crack cocaine it attributed to him, the amount of heroin for which the court held Evans responsible results in the same base offense level of 38. After applying the appropriate weapon and leadership enhancements and the acceptance-of-responsibility reduction, Evans's advisory guidelines range remains 360 months to life. As such, any *Kimbrough* argument would be frivolous.

We have reviewed the other arguments Evans and his attorney advance and conclude there are no nonfrivolous issues for appeal. The government was not required to prove sentencing facts beyond a reasonable doubt; the district court properly calculated the quantity of drugs attributable to Evans and made appropriate credibility determinations; and the court properly applied a dangerous-weapon enhancement to Evans's offense level. Also, Evans's argument that the district court improperly applied a four-level enhancement for serving as a leader of the conspiracy is frivolous; the argument was not raised in the district court, and on plain-error review Evans cannot prevail because the government introduced substantial evidence describing the supervisory power Evans

wielded in the conspiracy. Finally, the district court imposed a reasonable sentence after giving due consideration to the § 3553(a) factors. Accordingly, we grant Evans's counsel's motion to withdraw.

F. Thompson's Rule 41(g) Motion

When Thompson was arrested in May 2004, the government seized cash and personal property from Thompson's residence and business. The seized property included computer equipment, financial documents, electronic equipment, a 2001 Ford Excursion (which is no longer in the government's possession), and approximately $320,000 in cash. Although the indictment included a count seeking forfeiture of this property as proceeds of Thompson's drug-trafficking activities, to our knowledge the government has not pursued forfeiture. Furthermore, apparently because of an oversight, no reference to the seized property was included in the PSR; it was not considered when the district court calculated Thompson's guidelines range and imposed his sentence.

While this appeal was pending, Thompson filed a pro se motion under Rule 41(g) of the *Federal Rules of Criminal Procedure* seeking the return of the property.[3] Rule 41(g) provides:

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[3] The district court had jurisdiction to consider Thompson's Rule 41(g) motion while his criminal appeal was pending because a Rule 41(g) motion initiates a new civil equitable

(Continued on following page)

> A person aggrieved . . . by the deprivation of property may move for the property's return. . . . The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.
>
> Thompson argued (among other things) that he wanted the money returned in order to settle a pending tax dispute with the IRS and to support his wife and his 19 children.

The district court held a status hearing on the motion and noted that because Thompson's PSR did not include the seized funds as assets potentially available to Thompson, the true size of Thompson's assets was not fully known at sentencing. The court suggested that this information might have warranted a larger fine beyond the $100,000 it imposed when it sentenced Thompson. Because Thompson's appeal of his sentence was pending in this court and the district court lacked jurisdiction to revisit Thompson's sentence unless we vacated it, the court decided to hold Thompson's Rule 41(g) motion in abeyance until we resolved Thompson's appeal. Thompson objected, and the district court shifted course and simply denied the motion as premature, saying that if

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proceeding. *United States v. Howell*, 354 F.3d 693, 695 (7th Cir.2004).

Thompson's sentence was affirmed, it would "promptly decide" a new Rule 41(g) motion.

Thompson appealed this order, challenging several aspects of the district court's handling of his motion. First, he argues that the district court should have entered a default judgment against the government. Second, he claims the district court erred by not deciding the merits of his Rule 41(g) motion. Third, he contends that the district court should not have held hearings on the Rule 41(g) motion outside of his presence. We conclude, however, that we lack jurisdiction to consider any of these arguments because the district court's order was not final under 28 U.S.C. § 1291. The district court made it clear that the denial of Thompson's Rule 41(g) motion was without prejudice and he was free to refile it; "[a] dismissal without prejudice is normally nonfinal because the plaintiff remains free to refile his case." *Mostly Memories, Inc. v. For Your Ease Only, Inc.*, 526 F.3d 1093, 1097 (7th Cir.2008). While "[i]n some instances . . . a dismissal without prejudice may effectively end the litigation and thus constitute a final order for purposes of appellate review," *id.*, this is not one of those cases. The district judge indicated that the Rule 41(g) motion was premature and she wanted to wait until Thompson's merits appeal was resolved before addressing the substance of the motion. The judge said she would "promptly decide" a new motion after Thompson's merits appeal was decided. Accordingly, the court's order was nonfinal and we lack jurisdiction over Thompson's appeal.

Thompson also maintains, however, that the district judge should have recused herself based on an appearance of bias. It is somewhat unclear from the record whether Thompson ever made this request in the district court; Thompson's filings suggest that he raised the issue of bias and the court's decision briefly addressed the issue. In denying Thompson's Rule 41(g) motion as premature, the judge commented: "There is no basis for recusal and if [Thompson's] suggestion [of bias] is intended as a motion, it is denied."

A challenge to a district court's refusal to recuse may only be made by a petition for a writ of mandamus. *Tezak v. United States,* 256 F.3d 702, 717 n. 16 (7th Cir.2001). Although Thompson did not style his appeal as one seeking mandamus relief, we have previously said that an appeal of a denial of recusal should be construed as a petition for mandamus relief. *United States v. City of Chicago,* 870 F.2d 1256, 1259 (7th Cir.1989). Therefore, we will treat Thompson's appeal as a petition for mandamus.

Under 28 U.S.C. § 455(b)(1), a judge must recuse herself when she "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." As the Supreme Court has explained, neither judicial rulings nor opinions formed by the judge as a result of current or prior proceedings constitute a basis for recusal "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States,* 510 U.S. 540, 555,

114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Furthermore, "expressions of impatience, dissatisfaction, annoyance, and even anger" do not justify requiring recusal. *Id.* at 555-56, 114 S.Ct. 1147.

Thompson objects to some comments made by the district judge but none indicate bias. The district judge expressed some doubt that Thompson prepared his relatively sophisticated briefs himself and also remarked that his briefs were rude and impolite and "not very nice." These comments do not reflect impatience, dissatisfaction, annoyance, or anger. *Id.* Thompson also complains that the judge referred to him as a "kingpin," but this observation was entirely appropriate in light of the evidence introduced about Thompson's role in this conspiracy. *See United States v. Troxell,* 887 F.2d 830, 834 (7th Cir.1989) (referring to defendant as "Madame Cocaine" and calling the defendant "not a nice person" did not support a finding of bias regarding subsequent proceedings). Thompson is not entitled to mandamus relief.

III. Conclusion

For the foregoing reasons, we VACATE James Stewart's sentence and REMAND to the district court for resentencing in light of *Kimbrough.* We GRANT the motion to withdraw filed by Corey Evans's counsel and DISMISS Evans's appeal. We AFFIRM Derrick White's conviction. We AFFIRM Melvin Herbert's sentence. We AFFIRM Marvel Thompson's sentence. We DISMISS Thompson's appeal of the district

court's order denying his Rule 41(g) motion for lack of jurisdiction. To the extent that appeal constitutes a petition for mandamus, it is DENIED.

United States District Court
Northern District of Illinois

(Filed Apr. 26, 2007)

UNITED STATES OF AMERICA	**Case Number: 04-CR-464-1**
	Judge: Elaine E. Bucklo
v.	**Andrea Gambino, Defendant's Attorney**
Marvel Thompson	**Joseph M. Alesia, AUSA**

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT ENTERED A PLEA OF:

guilty to Count one of the Superseding Indictment, which was accepted by the court.

Any remaining Count is dismissed.

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Conspiracy to possess with intent to distribute controlled suibstance	June 2004	one

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **540 months**.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

> The defendant is sentenced on all count(s) of conviction, namely, Count one to a period of 5 years of Supervised Release.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE (As set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court:

> Drug testing may not eaxceed 104 times per year.

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) The defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may

be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

Other conditions imposed by the court:

As a special condition, any fine remaining upon release from custody shall be paid in monthly payments during supervised release at a rate of ten percent of the defendant's net monthly income

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payment." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$100.00	....$100,000.00	$	$

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

The interest requirement on fine(s) is waived.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.
- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.
- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18

U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

Pursuant to 18 U.S.C. §§ 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:

In full:

Due immediately.

The costs of incarceration and supervision are waived.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still o

The defendant is immediately remanded to the custody of the United States Marshal.

Date of Imposition of Judgment/Sentencing: April 26, 2007.

/s/ Elaine Bucklo
ELAINE E. BUCKLO
UNITED STATES
DISTRICT JUDGE

Dated at Chicago, Illinois
this 26 day of April, 2007.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 04 CR 464
v.	)	Chicago, Illinois
MARVEL THOMPSON,	)	March 29, 2005
Defendant.	)	1:00 p.m.

TRANSCRIPT OF PROCEEDINGS
– CHANGE OF PLEA
BEFORE THE HONORABLE ELAINE E. BUCKLO

APPEARANCES:

For the Plaintiff: MR. JOSEPH M. ALESIA
MR. DANIEL D. RUBENSTEIN
ASSISTANT UNITED STATES ATTORNEY
219 South Dearborn Street, 5th floor
Chicago, Illinois 60604
(312) 353-6630
469-6151

For the Defendant: MR. JACK FRIEDLANDER
LAW OFFICE OF JACK FRIEDLANDER
200 Russell Street, Suite 300
Hammond, Indiana 46320
(219) 932-7300

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PREPARED BY COMPUTER

MICHAEL P. SNYDER
Official Reporter
United States District Court
219 South Dearborn Street, Room 1432
Chicago, Illinois 60604
Telephone (312) 435-5563

[2] (Proceedings in open court. Jury out.)

THE COURT: Is there going to be a plea?

MR. RUBENSTEIN: Presumably.

THE COURT: Do I have it?

MR. ALESIA: Judge, either it's going to be a blind plea or, if it is going to be a written agreement, agreement, we are going to need a few hours to maybe at the end of the day, we'll get the final draft to Mr. Friedlander.

THE COURT: Well, okay. If it's going to be a blind plea, I need something to work from.

MR. ALESIA: Judge, I can give you –

THE COURT: Who are we talking about?

MR. ALESIA: Marvel Thompson.

THE COURT: What is it you've got there?

MR. ALESIA: Judge, it's a draft of a written plea agreement, but if it's going to be a blind plea, I don't know if you still wanted that.

THE COURT: Well, I just –

MR. FRIEDLANDER: The only reason I can't comment, Judge –

THE COURT: I haven't memorized quite what they are all charged with, the exact things that people are charged with, so I just need something to work from.

MR. FRIEDLANDER: I would think you would probably need the indictment.

[3] MR. ALESIA: That I can give you, Judge.

MR. RUBENSTEIN: If Mr. Friedlander doesn't object, Your Honor, we'll give this to you just as a guide for the change of plea hearing as to what the charges are.

THE COURT: What would he be pleading to?

MR. ALESIA: The drug conspiracy.

THE COURT: Count 1? All right. Well, we've been using a summary of it. I assume I could –

MR. ALESIA: Judge, here's the Count 1.

THE COURT: Well, we have to wait till he gets here. Then you're going to tell me if it's going to be a blind plea.

MR. FRIEDLANDER: Judge, I talked with my client, I spent two and a half hours up in Kenosha, Wisconsin, after returning from being out of

town, because this was originally scheduled for March 16th, and for some reason the prisoner wasn't brought over on that date.

THE COURT: Oh.

MR. FRIEDLANDER: And I went out of town. I got back, I met with Mr. Thompson on Sunday in Kenosha for two and a half hours, went through everything at that time.

He was undecided at that stage as to whether or not he was accepting the government's plea or whether he was going to plead in the blind. I went upstairs today to meet with him, and he basically still was undecided which way he was going to proceed.

[4] THE COURT: Okay.

MR. FRIEDLANDER: And the only thing I was going to ask the Court, I see you're picking the jury, I know time is – it may be in everybody's best interest to hold this over till Thursday because my client's wife and significant other now wish to talk with him because they are concerned for him as well, and I don't know if all that can happen today.

MR. RUBENSTEIN: Your Honor –

THE COURT: Where is he?

MR. ALESIA: He's on his way.

MR. RUBENSTEIN: He's on his way down.

Can we do this, Your Honor, and this is somewhat unusual, but if it's counsel's request, perhaps he could briefly, in the presence of the marshals, speak to them in the courtroom, and that might help expedite things. But you have to order that because of security reasons.

MR. FRIEDLANDER: I think it would be very helpful for the two family members, his sister and his wife, to talk to him today because of the unsurety the defendant's voice.

THE COURT: Okay. I'm just telling you that Mike has got, he has to, he's got to get lunch.

MR. RUBENSTEIN: Well, why don't we do this, Your Honor. If they bring him down, give him a –

THE COURT: This is why he should be here.

MR. RUBENSTEIN: – chance to talk to [5] Mr. Friedlander, and if you order it without contact talking to the two family members, and then you delay taking the change of plea for, say, a half-hour until 1:30, and then we do it either then or at the end of the day?

MR. ALESIA: Judge, what we could do is, if his family members remain there, Mr. Thompson at counsel table with the marshals, and Mr. Rubenstein and I will step out so there's no –

MR. RUBENSTEIN: The marshals will have to remain, but so they can have a private conversation.

MR. ALESIA. If it is going to be a plea, Judge, I –

THE COURT: Well, if he isn't here in the next minute, it's just not going to happen right now because I really, we just can't do this. I understood he was to be ready the second the jury left.

THE CLERK: They said they wanted to take this defendant back before they bring the other one.

MR. RUBENSTEIN: We can't control that, Your Honor.

MR. FRIEDLANDER: Judge, off the record.

(Discussion off the record.)

MR. RUBENSTEIN: And, Your Honor – never mind.

THE CLERK: 2004 CR 464, USA versus Thompson; for change of plea.

MR. ALESIA: Good afternoon, Judge. Joe Alesia and Dan Rubenstein on behalf of the United States.

[6] MR. FRIEDLANDER: Jack Friedlander on behalf of Marvel Thompson in custody standing next to me in open court, Judge.

THE COURT: All right. So what are we doing?

MR. FRIEDLANDER: Judge, the only request I would make at this time the family has asked me to have a moment to speak with Mr. Thompson prior to today's proceedings, so I'd ask the Court that he be allowed to do that.

It was anticipated that there would be a change of plea either by way of blind plea or by plea agreement. As I explained to the Court, as of this juncture, I don't know which way the defendant is currently leaning.

MR. ALESIA: Judge, the government would have no objection. If it's here in open court, Mr. Rubenstein and I will step out to allow private conversations between Mr. Thompson, his counsel, and his immediate family members.

THE COURT: Well, it still has to be up to the marshals.

THE MARSHAL: Your Honor, our policy is we don't allow any types of communication like that in a courtroom. I mean, if agents want to pick him up and take him to the AUSA's office and they do whatever they want there; our policy is we don't let them communicate in the courtroom.

MR. FRIEDLANDER: Would it be –

THE COURT: Well, they can talk, I suppose, as long [7] as there is a distance, right?

THE MARSHAL: I'd have to check with a supervisor. It's just not, it's not what we are told to do.

THE COURT: I'm at a loss as to the point of a conversation. I mean, frankly, I can order that he sit down, and they can sit down, and if it's just a conversation, I suppose I will just allow it. But if it's – but it would have to be at such distance that I don't know if that's a conversation.

MR. RUBENSTEIN: Well, Your Honor as Mr. Alesia said, we'll step out of the courtroom. The marshals would have to be present, obviously, but we'll step out of the courtroom.

THE COURT: Is that going to be a conversation really?

MR. FRIEDLANDER: Judge, I think the nature of the conversation for the purpose of the marshals being here isn't going to be a problem at this point.

THE MARSHAL: Our concern with the conversation is if there's any type of messages or things that are being passed, maybe that we don't know about, that's why we normally don't, we don't, you know, allow that to happen.

THE COURT: All right. You two leave, I guess, but this is obviously not a confidential conversation in any possible way.

MR. FRIEDLANDER: It's not a confidential [8] conversation.

THE COURT: I will ask that you just sit down there, and if you people have something you want to say, but they are right there. But, you know, you have to sit wherever they tell you to sit and this –

MR. RUBENSTEIN: Let's clear the courtroom, Your Honor, other than the two family members, his counsel, and the marshals, if that's alright?

MR. FRIEDLANDER: Judge, there's a lady in here who I have no idea who she is.

THE COURT: I don't know who she is either. Okay.

(Discussion off the record.)

THE COURT: Okay. If it's going to be further, it's really going to have to be a conversation some other time some other place.

MR. FRIEDLANDER: No, I'm going to tell Mr. Rubenstein to come back in.

THE COURT: Okay.

MR. FRIEDLANDER: Judge, my client indicated prior, as the Court probably heard –

THE COURT: I wasn't listening.

MR. FRIEDLANDER: At this juncture, I still don't know if – my client indicated he's not

signing the plea agreement. Whether that means he's pleading blind, I think he wants to talk to Your Honor against my advice, he still wishes [9] to talk to Your Honor.

THE COURT: All right.

THE DEFENDANT: Well, Your Honor, I want to plead guilty to the things that I done, and things in that plea I can't plead guilty to it because I didn't do it. So, I mean, whatever I've done and it's in Count 1 then, I'll plead guilty to it, but I just can't sign that plea.

THE COURT: All right. You know. I don't want to take a plea when – frankly, I'm not comfortable taking one right after a conversation that looked like it was probably emotional. And it's also 1:15 at this point. Our jury comes back, we start trial.

MR. RUBENSTEIN: Judge, we can come after the jury is done today.

THE COURT: Well, I have a TRO at 4:30, but I truthfully don't think that will last very long. I can put them off. We can do this at 4:30, but I don't – if that's alright.

MR. ALESIA: We'll be back, Judge.

MR. RUBENSTEIN: And with the –

THE COURT: Okay. You know, okay. Any other conversation is really going to have to be someplace else.

MR. RUBENSTEIN: I understand, Your Honor.

MR. FRIEDLANDER: My only question, Judge, I know that everybody is interested in determining what Mr. Thompson's [10] position is by the close of business today, but I feel –

THE COURT: It doesn't have to be today. I don't care.

MR. FRIEDLANDER: My suggestion is to give us two days then and let his family go up and visit with him and decide what's he's going to do, is that going to change anything or not.

THE COURT: All right. I believe this case will go to the jury Thursday morning. Do you want to come back sometime Thursday afternoon?

MR. ALESIA: Judge, we have –

THE COURT: I know there's a couple others.

MR. ALESIA: We have one at noon and one at 4:30.

THE CLERK: We will change the time, the noon time if the case is going to be done.

THE COURT: Well, this case conceivably will go to the jury on, could go on Wednesday, but Thursday morning is a better guess. I'm guessing that –

MR. FRIEDLANDER: I'm unavailable Thursday until late in the afternoon, 3 o'clock, 2 o'clock.

THE COURT: Well, do you want to say –

MR. FRIEDLANDER: I mean I'll wait today.

THE COURT: Do you want to say 2 o'clock on Thursday?

MR. FRIEDLANDER: Yes.

THE COURT: Okay, Really, this is why I –

[11] MR. RUBENSTEIN: Your Honor, I'm not sure the defendant –

MR. ALESIA: Judge, we'll work out the date. I know you have to take lunch. We'll work out a date.

THE COURT: Okay,

MR. FRIEDLANDER: He want to do it later today, Judge.

THE COURT: You want to do it later today? I mean, we can. As far as I'm concerned, if you're ready and you want to do it, we can do it at 4:30.

MR. ALESIA: We'll be back then, Judge.

MR. RUBENSTEIN: Yes.

THE COURT: Okay.

MR. ALESIA: Thank you.

THE COURT: I don't know what that does. Okay.

(Recess.)

THE CLERK: 2004 CR 464, you USA versus Marvel Thompson; for change of plea.

MR. ALESIA: Good afternoon, Judge. Joe Alesia on behalf of the United States.

THE COURT: Good afternoon.

MR. FRIEDLANDER: Judge, Jack Friedlander on behalf of Marvel Thompson.

THE COURT: Good afternoon.

All right, So are we here for a plea?

[12] MR. FRIEDLANDER: Judge, I spent another hour and a half going through the indictment and what the defendant needed to do to acknowledge his responsibility and plead guilty to, and he's indicated to me again that he wants to plead guilty to Count 1, but there certain particulars to it as to what his involvement were in that specific count.

Judge, obviously to take a plea on Count 1, all that the defendant would need to plead guilty to and to admit and acknowledge is that the conspiracy as charged in Count 1 existed; that, number two, the defendant knowingly became a member of that conspiracy with an intention to further it; and, finally, Judge, that the conspiracy involved in excess of 50 grams of crack cocaine and in excess of five kilograms

of cocaine, which I don't believe – well, that would simply be, that's all he would have to plead guilty to.

THE COURT: What I have in front of me is a superseding information?

MR. ALESIA: Judge, you asked for – that is Count 1 of the indictment, Judge.

THE COURT: Okay. Well, I mean, is he pleading to an information or an indictment?

MR. ALESIA: No, Judge, he's pleading to Count 1 of the indictment. As I said, what I gave you before was just a draft. That is actually the same Count 1 that's in the superseding indictment.

[13] THE COURT: Okay. Well, I needed to know that.

MR. FRIEDLANDER: The only problem, Your Honor, is that the defendant has indicated to me and as an officer of the Court that he would plead guilty to five kilos of cocaine, one kilo of heroin.

THE COURT: You know, somebody closed the door right at the second you were talking. He would plead guilty to what?

MR. FRIEDLANDER: Five kilos of cocaine, one kilo of heroin, but he does not acknowledge the crack cocaine as charged in the indictment.

MR. ALESIA: That's fine. For Apprendi purposes and what he has to plead guilty to here, Judge, at least five kilograms of cocaine and one

kilogram of heroin. If that's what he's going to plead guilty to, then that would be sufficient to take his plea. Then obviously drug quantities, role in the offense, firearms, all those other factors would be determined by Your Honor at the time of sentencing.

THE COURT: All right.

MR. FRIEDLANDER: And with respect to that, and the defendant can correct me if I'm in error, his involvement with respect to the named co-conspirators or the co-defendants alleged in this indictment are Donnell Jehan and Kenyatta Coates. Other than that, he had no actual involvement in the sale of narcotics or involvement.

Is that correct?

[14] DEFENDANT: Correct.

THE COURT: I guess I'm not really sure if we are doing this, but I'll go ahead, and we'll see, as long as – let me make sure that we understand what the point of this is, is that you think, you want to plead guilty to Count 1 of the indictment, is that right?

DEFENDANT: Ma'am, just the involvement that I was in as far as the drugs that I had involved with Jehan and Coates.

THE COURT: All right. Now, Count 1 charges a conspiracy.

MR. FRIEDLANDER: He admits that he conspired, Your Honor.

THE COURT: We'll go through it in detail, but I just want to make sure that you and I have an understanding of what it is that you would be pleading to and that –

What happens with the – of course, the conspiracy charges various drugs. So you don't care that he doesn't agree on the other, or it doesn't make any difference to you?

MR. ALESIA: It doesn't make any difference for his plea of guilty to Count 1 for Apprendi purposes, that as long as he is pleading guilty to a minimum of five kilograms of cocaine, one kilogram of heroin, then drug quantities, guideline drug quantities will be proven up at sentencing. We don't have to – he doesn't have to admit to a specific

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[16] MR. ALESIA: We do, Judge.

THE COURT: All right it's my understanding that you wish to plead guilty to Count 1 of the superseding indictment. Now, before I can accept your plea of guilty, I must determine that you are mentally competent to plead at this time, that you've had the assistance of a lawyer, that you understand your trial rights, that you understand the charge against you, that your plea is voluntary, and that there is a basis in fact for your plea.

Now, I must put you under oath and ask you questions, and I want you to understand that you may talk to your lawyer at any time. If you give any

false answers to any of my questions, you could be charged with a new and separate crime. In giving truthful answers to some of my questions, you will be giving up your right not to testify against yourself, some of your answers will be incriminating, and you will have to admit your guilt.

Do you understand what I have told you?

DEFENDANT: Yes, ma'am.

THE COURT: Would you please swear the defendant.

THE CLERK: Raise your right hand, please.

(Defendant sworn.)

THE COURT: Would you state your name for the record, please.

DEFENDANT: Marvel Thompson.

[17] THE COURT: Mr. Thompson, how old are you?

DEFENDANT: I'm 36.

THE COURT: Where do you live?

DEFENDANT: 6727 South – 6727 – 25 South Parnell, second floor.

THE COURT: Are you married?

DEFENDANT: No. I have a fiance.

THE COURT: How far did you go in school?

DEFENDANT: 11th or 12th grade. I'm not exactly sure now.

THE COURT: Do you have any difficulty reading and writing?

DEFENDANT: No.

THE COURT: All right. What kind of work have you done in the last three years?

DEFENDANT: I'm a record producer, I have a construction company, a restaurant, mostly home improvements.

THE COURT: Are you basically in good physical health?

DEFENDANT: Yes, ma'am.

THE COURT: Have you taken any medication or drugs of any kind or alcoholic beverages within the last 24 hours?

DEFENDANT: No, ma'am.

THE COURT: Have you ever been under the care of a doctor or in a hospital for a mental condition?

* * *

[20] agreement there.

THE DEFENDANT: Okay.

THE COURT: All right. Tell me the name of the attorney who is representing you in this case.

THE DEFENDANT: Jack Friedlander.

THE COURT: Have you had enough time to talk to your attorney?

THE DEFENDANT: Not really; but we have an understanding.

THE COURT: You've not had enough time?

THE DEFENDANT: Well, I'm in Kenosha County Jail, and it's two and a half hours. I think I've been there like maybe seven months, and I've seen him like four times maybe.

MR. FRIEDLANDER: I think I've been there at least eight to ten times, and I have been there for proffers on at least two other occasions.

THE COURT: Whether you have been there three times or two dozen times, the issue to me is just whether Mr. Thompson feels like he's had enough time to talk to you, because if not, there's always the potential for other problems. So I'm not going to take a guilty plea until he has felt like he's had enough time to talk to you.

THE DEFENDANT: Your Honor, I understand the nature of the charges, and I just, I mean, I just answered the question that you gave me just so that you will be aware. And [21] I understand the nature of the charge, and I'm accepting my responsibility of those regardless of what I'm saying.

THE COURT: Okay. Well, my question was have you had enough time to talk to your attorney? And I think your answer is no. And if the answer is no, I can't accept a guilty plea.

THE DEFENDANT: It's yes, then, I had enough time to understand exactly what I'm dealing with, yes, ma'am.

THE COURT: Well, in what sense did you think you – did you – why did you initially say no?

THE DEFENDANT: Well, there's a lot of things that I wanted to do and just couldn't get done during the time in the process that we needed, and –

THE COURT: Well, I think maybe you people better spend some more time talking. I'm sorry you're up in Kenosha. That's not something I can do anything about. But we are not in that much of a hurry, so I'm not going to take this today.

And it's not, I'm not trying to punish you in any way; I just really need to feel comfortable and you need to feel comfortable that you have had sufficient time to talk to your attorney.

And I know you said you wanted to plead today, but you're also saying that there are other things that you wanted to do and to talk to him about, and it's a lot more important that you feel like you have had enough time to talk to him and have explored whatever options you have than it is that we take

* * *

[23] Another issue that I was going to bring up is I was going to ask to be court appointed because he's without funds now, and I've just continuing on because I believe it's my duty to represent my client. When I usually take a case, I don't get out.

Money really isn't the issue. I think the issue is what the defendant considers a conspiracy to be, what the government and the law consider a conspiracy to be, and how the two of them intertwine. I've spent numerous time drawing circles, expressing my feelings with regard to the law, and telling him how he would fit into a conspiracy, how he would not, what a blind plea would be, what the plea agreement would be. And there was another attorney in this case prior to my involvement, and I got into this case in July of '04, and have acted to zealously defend my client since that date.

Mr. Thompson's understanding of what a conspiracy is, based on the filing by the government and what the law's theory is, are two different things. He acknowledges that he did commit certain acts. He acknowledges that he did do certain things. But I don't know that I can tell him any more than I have told him in the almost 100 some hours that I've been with him.

THE COURT: Just one second.

(Interruption.)

THE COURT: I'm sorry.

[24] Okay. Let me ask a different question. Do you want to go ahead today?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Well, have you told your attorney everything you know about your case?

THE DEFENDANT: Yes.

THE COURT: All right. Are you satisfied with the advice and efforts of your attorney?

THE DEFENDANT: Yes, ma'am.

THE COURT: You are charged in the superseding indictment in this case with conspiring and agreeing with others to knowingly and intentionally possess with intent to distribute and to distribute controlled substances, namely, in excess of five kilograms of mixtures containing cocaine, in excess of one kilogram of heroin, and in excess of 50 grams of cocaine base, commonly known as crack, as well as marijuana.

Now, have you read the superseding indictment?

THE DEFENDANT: Yes.

THE COURT: And have you discussed that indictment with your attorney?

THE DEFENDANT: Yes.

THE COURT: Do you understand the charge against you?

THE DEFENDANT: Yes, ma'am.

THE COURT: I should ask, are there other charges involving him?

[25] MR. ALESIA: Not at this point, Judge, in terms of this is the only counts he's charged with.

THE COURT: Okay.

Under the Constitution and laws of the United States you are entitled to trial by jury on the charges against you. Do you understand this?

THE DEFENDANT: Yes.

THE COURT: You have counsel here to assist you today.

Now, up till now you've been retained, is that right?

MR. FRIEDLANDER: I've been retained counsel.

THE COURT: All right. If you chose to plead not guilty, you would have the right to the assistance of counsel at trial as well. If you chose to plead not guilty and you no longer had the funds to hire a lawyer, I would appoint a lawyer to serve as your counsel at trial at no cost to you if you could afford no cost. Do you understand this?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you have a right to plead not guilty?

THE DEFENDANT: Yes.

THE COURT: If you plead not guilty, you have a right to a speedy trial, to see and hear all the witnesses called to testify against you, your lawyer would have a right to cross-examine witnesses, and you could use the subpoena of the [26] Court to obtain the attendance of witnesses to testify on your behalf. Do you understand this?

THE DEFENDANT: Yes.

THE COURT: At trial, you'd be presumed to be innocent, and the government would be required to prove you guilty by competent evidence beyond a reasonable doubt before you could be found guilty, and you would not have to prove you were innocent. Do you understand this?

THE DEFENDANT: Yes.

THE COURT: At trial you'd have the right to testify if you wanted to, but you would also have the right not to testify, and if you chose not to testify, no inference or suggestion of guilt could be drawn from the fact that you did not testify. Do you understand this?

THE DEFENDANT: Yes.

THE COURT: The trial could be either a jury trial or a trial by a judge without a jury. A trial by a judge would occur only if you agreed to it. The government and I would also have to agree. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If the trial were a jury trial, the jury would be composed of 12 persons selected from a large group whose names have been drawn at random from voters' lists. You and your attorney would have the opportunity to exclude jurors if they were biased against you or otherwise disqualified, and [27] you would be able to exclude a certain number of jurors simply because you did not want them to serve on your jury. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you had a jury trial, a jury would have to agree unanimously and would have to consider each count of the indictment separately. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: At any trial, a judge or jury would be guided by the rule that requires that guilt by determined beyond a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that if at a trial you were found guilty, you have a right to appeal?

THE DEFENDANT: Yes.

THE COURT: Now, do you understand that if you plead guilty, you waive, you give up all of these trial rights?

THE DEFENDANT: Yes.

THE COURT: If you plead guilty and I accept your plea, there will be no trial, and I will enter a finding of guilty on the basis of your plea and sentence you after a sentencing hearing. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: The government will have to tell me what the maximum statutory penalty is.

[28] MR. ALESIA: Yes, Judge. Per the statute, the maximum penalty in this case is life imprisonment with a mandatory minimum penalty of at least ten years imprisonment, a maximum fine of $4 million, and a term of supervised released not less than five years up to any number of years including life which the Court may specify at the time of sentencing. There would also be a $100 special assessment in this case.

THE COURT: Do you understand all that?

THE DEFENDANT: Yes.

THE COURT: Has anyone forced you in any way to plead guilty?

THE DEFENDANT: No, ma'am.

THE COURT: Has anyone threatened you in any way to cause you to plead guilty?

THE DEFENDANT: No, ma'am.

THE COURT: Have there been any promises that have been, that have been made to you to cause you to plead guilty?

THE DEFENDANT: No.

THE COURT: Is your decision to plead guilty entirely voluntary?

THE DEFENDANT: Yes.

THE COURT: Do you understand that I have the final decision as to what your sentence will be?

THE DEFENDANT: Yes, ma'am.

THE COURT: Will the government please summarize what [29] its evidence would be with respect to Count 1 if this case were tried.

MR. ALESIA: Yes, Judge. The government would present evidence to prove beyond a reasonable doubt that the conspiracy as alleged in Count 1 existed; that, second, the defendant knowingly became a member of the conspiracy with an intention to further it; and that the conspiracy involved in excess of five kilograms of cocaine and one kilogram of heroin.

Specifically, the government would call witnesses to prove that, Your Honor, during that time frame of approximately 1989 through May of 2004, the defendant as a member of the Black Disciples sold powder cocaine and heroin to other BDs and other individuals in areas on the south and east sides of Chicago; that during the course of the conspiracy the defendant rose through the ranks of the BDs and became a king for all BD members; that the defendant was the only unincarcerated BD member to hold this rank until approximately 2003 when co-defendants Donnell Jehan and Albert Span also obtained the rank of king for the BDs; and at that time the defendant remained a BD king for the south side of Chicago.

As a king, the defendant implemented rules and laws that BD members had to follow. The defendant attended and conducted BD gang meetings where the members talked about any problems that may be interfering with the gang's drug sales, and on occasion members of the gang were violated for breaking [30] one of the gang's laws.

The defendant further admits that the BDs had laws and rules that its members were required to memorize and obey. Two of the principal laws of the BDs were aid and assistance and the code of silence. Aid and assistance stated that all BD Members must assist any other member whenever called upon for any purpose. The code of silence stated that no member of the gang was permitted to discuss gang business or activities with nonmembers.

The punishment meted out for violations of BD rules ranged from financial fines to severe physical beatings, being shot, up to and including murder. If a gang member broke the code of silence rule with law enforcement authorities, the punishment was death. During the course of the conspiracy the defendant admits that he ordered and at times carried out beating violations.

The defendant initiated and oversaw street corner cocaine and heroin selling operations carried out by BD members. Members under the authority of defendant sold drugs and provided security for the drug selling locations. Security included using BD members and others as lookouts to warn members when selling drugs of possible interference by the police, robbers, or rival gang members. BD members providing security for locations selling drugs often carried firearms.

Defendant also purchased kilogram amounts of cocaine [31] and heroin from wholesaler distributors during the course of the conspiracy. The defendant resold these drugs to BD members and others. The amount of cocaine involved in this conspiracy is in excess of at least five kilograms of cocaine and one kilogram of heroin.

The defendant admits that he and other co-conspirators possessed and carried firearms and used threats of violence to advance the conspiracy's objectives of selling cocaine and heroin, to maintain discipline of the members, to avoid detection of drug

selling by law enforcement, and to preserve the proceeds of drug sales, threats and acts of violence performed by members for these purposes including intimidation of witnesses, collection of money owed for drug transactions, and shooting at officers. Some of the guns were provided and controlled by ranking BDs.

During the course of the conspiracy the defendant obtained real estate, buildings and vehicles from proceeds of drug sales, some of which were laundered in an attempt to hide the source of these funds.

Defendant admits that he routinely called to or from cellular and land line telephones to facilitate the conspiracy.

Finally, Judge, specifically on or about March 12th, 2003, the defendant, as a leader of the BDs, ordered another BD member to shoot a victim BD member in the hand with a small caliber handgun as a gang violation because the BD member had [32] violated an order that was given to him by the defendant. The defendant was – the victim was ordered shot once in the hand, and the purpose of the shooting was to keep order and discipline in the ranks of the members.

THE COURT: Have you heard the statement of the assistant United States attorney?

THE DEFENDANT: I don't plead guilty to all that. That's the problem. I can't do that.

THE COURT: Okay, why don't you tell me what it is that you agree that you did.

THE DEFENDANT: The drugs.

MR. FRIEDLANDER: Specifically.

THE DEFENDANT: The drugs. Specifically?

THE COURT: Yes.

THE DEFENDANT: I sold, at one time in 2004 I sold five keys of powder cocaine in 2004, and in 2004 I sold another eight, another five, and another nine, one to Coates and the other ones to Jehan, and I sold about, approximately about a thousand grams of heroin to Jehan in 2004.

As far as the kings and all that, that's, that's – I told them that a thousand times, that's not me.

THE COURT: What else? Let's see. What about the conspiracy part?

MR. ALESIA: Judge, if the defendant is admitting that he conspired with members of the BDs, and if he's [33] admitting that Mr. Jehan and Mr. Coates are members of the BDs, that he knowingly became a member of that conspiracy with an intention to further it in terms of those drugs, and the drug quantity –

THE COURT: Okay, stop, stop.

Do you agree to that part?

THE DEFENDANT: Jehan has a geographic area that he has individuals that he deals with, and the geographical area that I live in is the individuals, the BDs that I deal with, and Coates have an individual area that he deals with individuals, and they all have different rules and laws that they deal with, and where I'm from is different rules and law, and none of the guys where I'm from are incarcerated are even charged with the case. I'm charged with other individuals that are not even on this case, that are not even from my neighborhood or even from any structure or ranking or position in my neighborhood.

MR. FRIEDLANDER: I think the question she asked you is do you agree with the fact that you conspired with Jehan as well as Mr. Coates to, the way I understood it, to commit an illegal act, further the conspiracy, i.e., the sale of drugs and the purchase of narcotics.

THE DEFENDANT: I sold Coates a key of cocaine, and I sold – and I bought 150 grams of heroin from Coates, and I sold Jehan had to be like 13 keys of powder cocaine.

[34] THE COURT: Well, did you sell it to them with, expecting that they were then going to resell it?

THE DEFENDANT: Well, I had no knowledge of what they was going to do with it, Your Honor.

THE COURT: Well, it's quite a bit, I think. What did you expect them to do with it?

THE DEFENDANT: Well, I knew they was going to sell it yes.

THE COURT: You talked about having different areas?

THE DEFENDANT: Yes, ma'am.

THE COURT: Was that pursuant to an agreement?

THE DEFENDANT: No, actually we, all of us didn't actually get along, so I don't know, I don't know how we would be situated agreement. I was just trying to make a specific – I don't know. I don't know what's, what the agreement would be or – I don't know, I fully don't know.

THE COURT: Were you a member of the BDs?

THE DEFENDANT: They had different, they have Renegades from 59th Street that were, they had the Smashville Disciples from where Jehan was, and then you have the Dog Pound and the Dark Side where I'm from. So everybody had their own different structure and ranking members in their structure, and they owned different laws in the structure.

MR. ALESIA: Judge, I don't think he's answered your question, though, which your question was is he a BD member?

[35] THE DEFENDANT: I'm, from one area I'm from, yes, I am.

THE COURT: And were the – is what the assistant United States attorney said about the BDs being involved in an agreement to sell drugs, is that true?

THE DEFENDANT: I mean, I agreed to sell him those drugs, yes, and I agreed to sell Coates those drugs, yes.

THE COURT: This is your case. You have to decide whether you think that it's sufficient from your point for him to plead guilty I guess to the Count 1 to the extent if he wants to.

MR. ALESIA: That's correct, Judge.

THE COURT: As he has stated it. And you're going to have to tell me whether you believe that he's –

MR. ALESIA: Judge, we believe, based on his statements and his admissions, that he has admitted enough to plead guilty to Count 1 and has satisfied all – he's pled guilty to the elements of the conspiracy.

THE COURT: Well, he's disagreeing to some of what you said.

MR. ALESIA: Judge, obviously there's disagreements in terms of sentencing guideline factors such as role in the offense, quantities of narcotics, as well as the firearms and other guideline factors, but in terms of pleading to this count, we believe that there is a sufficient basis right now on [36] the record

for you to accept his plea of guilty and to set this case for sentencing.

THE COURT: All right. What is your plea to Count 1 of the superseding indictment?

THE DEFENDANT: I can plead only to the things that I have done. The other things as far as them, I can't do it, I can't – that's not what I – that's not – I can't do it.

MR. FRIEDLANDER: Did you hear what her question was?

THE DEFENDANT: But Count 1 consists of a multitude of different things.

MR. FRIEDLANDER: Right, You've explained to her that you sold drugs to Donnell Jehan, you sold drugs to Kenyatta Coates. Is that correct?

THE DEFENDANT: Yes.

THE COURT: And you're agreeing that you conspired?

MR. FRIEDLANDER: You conspired with those two individuals?

THE DEFENDANT: To sell them the drugs, yes, I sold them the drugs, yes.

THE COURT: All right.

MR. FRIEDLANDER: Judge, if I just may to – this is exactly the problem why we couldn't reach

a plea. He wants to admit his guilt with regard to what he did.

THE COURT: All right. Well, I do have some concern that if admits his guilt, that I just want to make sure that he

* * *

[38] for you to believe that he may have ordered violent acts. That's something that they have to show you. He understands all of this.

THE COURT: Is that true?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. I guess I still need to know whether you want to plead guilty to Count 1 of the superseding indictment or not, understanding that you're not acknowledging that every single fact stated in the superseding indictment is correct.

THE DEFENDANT: Can I see that please just for one second.

(Pause)

THE DEFENDANT: He mentioned something about the ordering of the shooting and the order of the shooting that was done. I don't see this in the –

MR. FRIEDLANDER: That's not in the indictment. That's the factual basis for what the act of violence was. He was giving the Court a factual basis that was at your direction or among others. One

example was the gentleman who was shot in his hand.

THE DEFENDANT: But I'm saying, how can he present that and it is not even in the indictment? That's not even in the indictment. How could he present something that's not even in the indictment?

* * *

[41] the facts you have stated?

THE DEFENDANT: Yes, to the facts that I have stated, I'm pleading guilty to that.

MR. FRIEDLANDER: And do you acknowledge that the facts as you have stated comprise Count 1 that form the basis for a conspiracy with the group that you dealt with, that you conspired with Don gel Jehan and that you conspired with Kenyatta Coates to sell drugs?

THE DEFENDANT: To sell the drugs that I sold to them, yes, I admit to that.

MR. FRIEDLANDER: And by selling it to them, you understood that you were furthering the object of the conspiracy, that being selling a controlled Schedule II narcotic, is that correct?

THE DEFENDANT: Unconsciously, if that's the point, yes. Yes. Yes.

MR. FRIEDLANDER: Judge, in my opinion, based on what the elements of conspiracy would

be, I believe the defendant has made a factual basis even through the limited – he doesn't have to do it with all of them, but he's done it with two members.

THE COURT: All right. Well, I think you've said that you're pleading guilty, is that right?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Since you acknowledge that [42] you are in fact guilty as charged in Count 1 of the superseding indictment as stated by you here and to the facts that you have stated, and you've had the assistance of counsel, and you know your right to a trial and the maximum possible punishment, and you're voluntarily pleading guilty, I will accept your plea of guilty and enter a judgment of guilty on your plea.

Now, are we putting this over? I certainly don't want to have more than one long sentencing hearing.

MR. ALESIA: Right. The Government would suggest that sentencing be deferred until after the completion of the first trial. This way Your Honor will have heard the witnesses that the government would have called at the sentencing hearing anyway to save the resources of the Court, and then once sentencing is set, I'm sure Mr. Friedlander and Mr. Thompson will submit their submissions, and the government will submit theirs in turn. And if we need to present additional witnesses at that time, we'll do so. But it seems prudent to at least schedule it until after the

completion of the first trial, which will be probably sometime in late July.

MR. FRIEDLANDER: Judge, I have an obligation at the direction of the defendant that he does not wish to postpone his right to a speedy sentencing.

THE COURT: Well, let's see. It's essentially April, April and May.

MR. FRIEDLANDER: It's been running usually 70 days, [43] I believe.

THE COURT: Frankly, if I'm in the middle of that trial, I don't know when I'm going to, I would have the sentencing. I'm not going to stop the trial for the sentencing, and I've warned people that I'm going to be out of town at least a couple of times during that trial. So it's going to be really limited time, so I honestly don't – I mean, I guess I can set this sentencing for probably the end of July, but I honestly don't think I could set it any sooner than that.

MR. FRIEDLANDER: Judge, if I can get my briefcase?

THE COURT: But we could go ahead then and set a sentencing date.

Why don't we just take a look here.

MR. FRIEDLANDER: Judge, just so the Court is aware, I'm unavailable from July 11th until July the 29th.

MR. ALESIA: Like I say, Judge, I think early August, mid-August. The trial should over by then.

THE COURT: If you say you're not –

MR. FRIEDLANDER: I'm on trial before – I'm on trial before Judge Leinenweber. I'm also scheduled in the early part of July on a trial in South Dakota.

THE COURT: I'm not troubled by that. I can set this for July 29th or something. I don't know whether –

MR. FRIEDLANDER: July what?

THE COURT: But maybe you are – will you be ready at [44] that point, do you think?

MR. FRIEDLANDER: Judge, by July 29th? I'd like to either do it before I begin the trial on July 11th or at least give me time to visit with the defendant when I get back.

THE COURT: That's what I was wondering. Well, do you want to make it August 4th, or is that not enough time, or is it enough time?

MR. FRIEDLANDER: That should be sufficient, Judge.

THE COURT: All right. Well if you find that it isn't, but we really, as I said –

MR. ALESIA: That's fine, Judge. At what time?

THE COURT: I think that will work. 9:30.

MR. ALESIA: Thank you, Judge.

MR. FRIEDLANDER: Judge, can I ask that the Court, I would make an oral motion to petition the Court to be appointed counsel at this point.

THE COURT: Yes, I mean, I think you have to fill out the form.

MR. FRIEDLANDER: I will.

THE COURT: We'll do that. Okay.

MR. FRIEDLANDER: Judge, did we set a time on August 4th?

THE COURT: 9:30.

(End of proceedings.)

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[45] CERTIFICATE

I, Michael P. Snyder do hereby certify that the forgoing is a complete true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable ELAINE E. BUCKLO, one of the judges of said Court, at Chicago, Illinois, on March 29, 2005.

_____

Official Court Reporter
United States District Court

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 3, 2009

Before

KENNETH F. RIPPLE, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 07-2086	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	
v.	No. 04 CR 464
MARVEL THOMPSON, *Defendant-Appellant.*	Elaine E. Bucklo, *Judge.*

ORDER

On consideration of the petition for rehearing, all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing is DENIED.